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JUDICIAL CONTROL OF ADMINISTRATIVE AND LEGISLATIVE ACTS IN FRANCE

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In recent years there has been an interesting and very remarkable extension of judicial control over the acts of the administrative authorities in France. The doctrine of recourse in annulment for excess of power, in particular, has undergone such an extraordinary development that it is probably safe to say that there is now no other country where private rights are better protected against arbitrary and illegal acts of public officers. It is an interesting fact also that this protection has not been created by legislation but is mainly the work of the council of state, and, to a less degree, of the court of cassation, the two supreme judicial tribunals of France.

The solicitude which the council of state, especially, has shown for the protection of individual rights and the independence which it has exhibited as over against the government by whom the councillors of state are appointed and by whom they may be removed at pleasure is a sufficient answer to the criticism of those English and American writers who assert that the French administrative courts are the docile and servile instruments of the government, and that in controversies between the administration and private individuals their decisions are generally in favor

of the administration. Scores of decisions might be cited in refutation of this view if the limits of this paper permitted. It is enough to say that few persons in France now entertain any such opinion regarding the subserviency of the council of state. On the contrary, it may be truthfully said that the council of state today enjoys a place in the public confidence, esteem and respect of the French people comparable only to that of the supreme court of the United States among Americans.[1] Thanks to its liberal jurisprudence[2] almost every unilateral act[3] of an administrative officer or authority, from the president of the republic down to the pettiest *garde champêtre* may today be judicially attacked and annulled for illegality.

The principal forms of judicial control may be grouped under two heads: first, the indirect control exercised by the judicial courts over illegal ordinances (*règlements*) of the administrative authorities; and, second, the direct control exercised by the council of state through its power to annul administrative acts for "excess of power," that is to say, acts which are *ultra vires*

[1] Laferrière (*Traité de la Juridiction Administrative*, 1888, vol. ii, p. 533,) justly remarks that "if any one may complain of the jurisprudence of the council of state it is not private individuals but the administration itself." If the council of state, he adds, had desired to favor the government at the expense of private individuals it could have done so by a strict interpretation of the laws of 1790 and 1872 from which its authority is derived; it could have denied recourse for excess of power for other reasons than incompetence; but it has not done this; on the contrary, it has constantly extended by interpretation the grounds of recourse to include violation of the law, vice of form and misuse of power; and, he might have added, it has constantly enlarged the number of persons to whom recourse is allowed.

[2] I use the word "jurisprudence" throughout this article not in the English and American sense of the word but as descriptive of the body of judicial precedent or case law.

[3] For historical and juridical reasons which cannot be explained here "acts of management" (*actes de gestion*) which are largely contractual in character, are not open to recourse for excess of power. Only "acts of authority," i.e., acts of command or injunction, acts which are not assimilable to those of private individuals may be attacked and annulled for excess of power. For a discussion of the distinction and the reasons therefor, see Jèze in the *Revue du Droit Public*, vol. 22, p. 105 and vol. 25, pp. 671 ff; Hauriou, *La Gestion Administrative*, p. 33 and Marie, "de L'Avenir du Recours pour Excès de Pouvoir" in the *Rev. du Droit Public*, vol. 16, pp. 265 ff and 475 ff.

for various reasons to be described hereafter. The control exercised by the judicial courts over illegal ordinances is based on what the French call the "exception of illegality," that is, the right of the individual who is prosecuted for violation of an ordinance which he believes to be illegal to plead the fact of illegality in bar of the imposition of the penalty which the law prescribes. During the *ancien régime* and for some time after the Revolution this plea was not admitted. During the early years of the First Empire the juducial courts were, to a large degree, the servile instruments of Napoleon and refused to admit the plea of illegality against all acts of the administrative authorities.[4]

Thus in 1807 the court of cassation held that the inferior courts had no power to refuse to apply police ordinances on the ground of their illegality. For a stronger reason ordinances issued by prefects and, of course, those emanating from the emperor were exempt from judicial control.[5] But before the fall of Napoleon the supreme court changed its attitude and in 1807 it quashed fourteen decisions of a police court at La Rochelle which had condemned certain individuals for violation of an illegal municipal ordinance. Thus the rule was laid down that the courts were not bound to impose penalties for violation of an illegal municipal regulation and in the same year the same rule in regard to ordinances emanating from prefects was affirmed. During the period of the Restoration the judges exhibited more independence because of their life tenure and in consequence of the greater prestige of the judicial tribunals as compared with the council of state, which had incurred the royal hostility largely because of its imperial origin. The judicial courts, therefore, freely asserted the right to refuse to impose fines for the violation of administrative ordinances which they regarded as illegal and the court of cassation upheld the right. During the period of the July monarchy the exception of illegality became firmly established and in some cases the courts even refused to apply

[4] Nézard, *Le Contrôle Juridique des Règlements d' Administration Publique* p. 6.

[5] Ibid., pp. 6, 15.

illegal ordinances emanating from the king.[6] It was during this period that the principle of the exception of illegality, which up to that time rested solely upon judicial precedent, was sanctioned by law. It is found in section 15 of article 471 of the penal code (as revised in 1832) which declares that "those found guilty of violating ordinances (*règlements*) *legally made* by the administrative authority shall be punished by a fine of from one to five francs." From that time until now the judicial tribunals have construed this provision as giving them the right to determine whether an ordinance for violation of which they are called upon to impose a fine, is within the legal competence of the authority from which it emanates and whether it is in conformity with the constitution and laws, and to refuse to impose the fine in case the contrary is found to be true.[7] This power is therefore an exception to the general principle embodied in the law of 1790, still in force, which forbids the judges under penalty of forfeiting their offices from interfering with the exercise of the executive or legislative power, and also to article 127 of the penal code which punishes with civil degradation judges who interfere (*s'immiscer*) in matters attributed to the administration.[8]

The second means of control is the power of the council of state to annul the acts of the administrative authorities for excess of power. This is a far more important form of control than the first mentioned; it constitutes the *pièce essentielle* of

[6] Thus in 1834 the court of Nîmes refused to apply a royal ordinance of 1822, on the ground that "it was a constitutional principle that an ordinance could not derogate from a law and that the ordinance in question was beyond the legal power of the executive as given by the chamber." The text of this decision may be found in Cahen's, *La Loi et le Règlement*, p. 376.

[7] It is not true as is sometimes claimed, however, that article 471, section 15 mentioned above has reference only to police ordinances. It applies to all ordinances and the power to refuse to apply those which are illegal belongs to all judges, correctional, civil and commercial. Compare Garraud, *Traité de Droit Pénal*, 2d ed., vol. i, p. 225 and Nézard, *Le Contrôle Juridictionnel*, p. 72.

[8] Laferrière, *Traité de la Juridiction Administrative*, vol. ii, p. 435 explains the right of the judges to refuse to apply *règlements* illegally made, as a right inherent in the power of the courts to administer criminal justice. For the same view see Garraud, *Droit Pénal*, vol. vi, p. 444. Hauriou (*Précis de Droit Administratif et de Droit Public*, 8th ed., p. 60), points out that this power serves as a "corrective" of French administrative law because the administration is here made accountable to the judicial rather than to the administrative courts.

French administrative law.[9] It rests almost entirely upon the jurisprudence of the council of state (and to a limited extent upon that of the tribunal of conflicts). The legislature could, of course, have intervened and freed the administration from the control to which the council of state by its decisions has subjected it, but it has not done so; on the contrary, it has acquiesced in the continued extension of this control and in various legislative acts it has been sanctioned by allusion. From the standpoint of the individual it possesses certain advantages over the control exercised by the judicial courts through the "exception of illegality"[10] since he is not compelled to violate the act and submit to a prosecution in order to bring the question of its illegality before the court. Moreover, other persons than those directly injured by the act may attack it before the council of state. Finally, if the objectionable act is annulled by the council of state, the effect operates *erga omnes*, that is to say, all persons concerned benefit from the annulment, whereas the judicial court does not annul the act but simply refuses to impose the fine prescribed for its violation.

The power of the council of state in an action of annulment for excess of power is strictly limited, however, to pronouncing the nullity of the act and it can do this only for excess of power. It cannot annul for expediency or other reasons; it cannot in a proceeding for annulment consider questions of fact;[11] nor mod-

[9] Jèze, *Principes Généraux du Droit Administratif*, p. 89; compare also Hauriou, pp. 434 et seq.

[10] On the whole question of the power of the judicial courts in respect to illegal ordinances see Nézard, *Le Contrôle Juridictionnel des Règlements d' Administration Publique* (1910), pp. 6–7; 15–16; Cahen, *La Loi et le Règlement*, p. 376; Moreau, *Le Règlement administratif*, p. 261; Laferrière, Op. cit., bk. vi; Hauriou, p. 60; Duquesnel, *Le Jurisprudence comparée du Conseil d' Etat et de la Cour. de Cassation*, pp. 9 ff. and 137 ff.

[11] M. Jèze, however, holds the contrary view and he quotes the opinion of M. Romieu, a distinguished member of the council of state, in the *Durand* case (1906) in favor of the view that in certain cases the council of state may pass upon questions of fact in proceedings for annulment. See his note in the *Revue du Droit Public*, vol. 28, p. 290. It would be a great advantage to suitors if when the council of state annuls an ordinance it could by the same decision award damages or furnish other redress without requiring the petitioner to bring a new action in the form of *recours contentieux*. M. Jèze advocates this change, *Principes Généraux*, p. 96.

ify or reform the act complained of, nor decree restitution, nor condemn the administration to pecuniary damages or otherwise redress the injuries which the individual may have sustained.[12]

Recourse in annulment for excess of power is an extraordinary remedy and ordinarily it is not open to the individual until he has exhausted every other remedy before the administrative and judicial courts. This is the theory of "parallel recourse" developed by the council of state for the purpose of preventing it from being swamped by a multiplicity of vexatious and unfounded actions and at the same time to avoid the appearance of usurping the jurisdiction of other courts. Thus a taxpayer can not by this procedure attack the act of a municipal council levying a communal tax, because the law has provided another remedy, namely recourse before the judicial tribunals. The general rule is that if the individual may get satisfaction through any other tribunal or even through an ordinary action before the council of state, this tribunal will not permit him to attack the act by a proceeding in annulment for excess of power.[13]

A very interesting evolution of the jurisprudence of the council of state has been the gradual relaxation of the old requirements in regard to the interest required of the individual to be

[12] This can be done by the council of state only by another proceeding known as ordinary contentious recourse or *recours contentieux de pleine juridiction*, as it is sometimes called. The council of state will refuse to entertain an action in annulment for excess of power when the result will have the direct effect of condemning the administration to indemnify the injured party or to compel it to do something in his behalf. Ordinarily it will say in substance to him "the purpose of recourse in annulment for excess of power is only to secure the nullification of the act; if you desire an indemnity or other reparation for wrongs suffered, another remedy is open to you, namely, the ordinary *recours contentieux* and you must use it." But the rigor of this doctrine affirmed as recently as 1911 in the *Desplogues* case seems to have been relaxed if not abandoned in 1912 in the *Lafage* case where the council of state admitted an action in annulment against the decision of a minister refusing an allocation to a military surgeon. It annulled the decision of the minister thereby indirectly condemning the state to allow the indemnity claimed. See note by M. Jèze in the *Revue du Droit Public*, vol. 29, pp. 266.

[13] Compare Laferrière, vol. ii, pp. 444 et seq., see also an article by Marie, "L'Avenir du Recours pour Excés de Pouvoir," in the *Revue du Droit Public*, vol. 14, pp. 27 ff.

admitted to attack judicially administrative acts for excess of power. Originally, it was necessary that he be able to show that the act complained of had violated a legal right but this rule has been abandoned and it is now sufficient for him to show that he possesses merely an interest in having the act annulled and this interest need not be direct and material but simply moral, that is to say, the interest which any citizen would have in seeing the act nullified.[14] Thus it has been held that an innkeeper whose inn fronts on a public square has sufficient interest to attack the order of a mayor forbidding the holding of a public fair on the square. Although the order injures no legal right of his he is interested in having the fair continued because of the increased business it brings to him by reason of the crowds it attracts to the vicinity of his hotel. He may, therefore, attack the act before the council of state and have it annulled in case it is *ultra vires*.[15] So an association of functionaries may attack an appointment, promotion, or dismissal of a public officer if the act is in violation of the ministerial ordinance governing appointments and removals and if the effect is to prejudice the promotion of any functionary belonging to the association. Any taxpayer may likewise attack an appropriation of money by a municipal council, or any other municipal act the effect of which is to increase his taxes, or to waste the funds or other property of the municipality. So any property owner has sufficient interest to enable him to attack a prefectoral order allowing an electric tramway company to stretch overhead wires on the public streets.[16]

The result of the relaxation by the council of state of the rigor of the old rule regarding the degree of interest required is, that today almost any citizen may knock at its doors and obtain the

[14] But it should be observed that it is not to satisfy his interest that recourse in annulation is allowed; it is to force the administration to observe and respect the law. Cf Berthélemy, *Droit Administratif*, 6th ed., p. 930.

[15] In order to avail of the *recours contentieux*, with a view to obtaining reparation for injuries he must, however, be able to show the violation of a *right;* mere interest is not sufficient as it is in the case of recourse in annulment.

[16] See the *Storch* case, 1905, analyzed by M. Jèze in the *Revue du Droit Public*, vol. 22, pp. 346 et seq.

annulment of an illegal administrative act.[17] The extent to which this privilege is availed of in practice is apparent from the crowded dockets of the council of state and the large number of decisions which it renders. The proceeding in annulment is simple, expeditious and inexpensive. The complaint is required to be filed on stamped paper (the cost of the stamp is 12 cents); there is now no *enregistrement* tax (unless the petitioner loses his suit in which case he is assessed $20 in costs), and since 1864 the services of an attorney have not been obligatory. With an expenditure of only twelve sous, therefore, the citizen may take his case to the supreme administrative court and have an illegal act of the administration declared null and void.

The grounds upon which the acts of the administrative authorities may be annulled, like the number of persons allowed to bring actions in recourse for excess of power, have been gradually multiplied as the council of state has become more and more inspired with liberal democratic ideas. Originally, annulment was pronounced only for incompetence and vice of form on the part of the author of the act attacked; then during the period of the July monarchy violation of the law was admitted as a ground for annulment, and, finally, after 1872, misuse or abuse of power (*détournement de pouvoir*) was recognized to be a sufficient ground for nullification. Most of the writers on administrative law today enumerate these as the only grounds upon which the council of state will nullify the acts of the administrative authorities.[18]

[17] The jurisprudence relating to the extension of the doctrine of interest is of very recent origin. In fact it first appeared in the *Casonova* case (1901) where a taxpayer was admitted to attack an ordinance of a municipal council appropriating 2000 francs for the support of a town physician. Since that date there has been an almost steady stream of decisions extending the right of recourse to new categories of persons. For a review of the more recent decisions see M. Jèze's note in the *Revue du Droit Public*, vol. 22, pp. 346 et seq; vol. 23, pp. 254 et seq., also his *Principes Généraux du Droit Administratif*, pp. 217 ff. Compare also Laferrière, vol. ii, p. 409; Hanriou, p. 464; Berthélemy, *Droit Administratif*, p. 931 and Moreau, *Le Règlement Administratif*, p. 300.

[18] Compare Hauriou, p. 437 and Laferrière, vol. ii, pp. 468 ff. M Jèze criticizes this classification as unscientific and inaccurate. Thus incompetence and violation of the law overlap and there are other grounds of recourse, he says, than those mentioned above. See his notes in the *Revue du Droit Public*, vol. 25, p. 682 and vol. 28, pp. 286 ff.

Incompetence may be due to usurpation; for example, a mayor issues an ordinance which only a prefect is competent to issue, or it may result from encroachment upon private interests, as where a municipal council establishes a system of municipal ownership or supports a town physician.[19] Vice of form results from the failure of the officer to observe the formalities required by the law, as where he fails to give the notice prescribed or where an "ordinance of public administration" issued by the president, fails to contain the visa, *le conseil d'état entendu*. Violation of the law results where the act is in contravention of the letter of the constitution, the statutes or the ordinances in force.[20] Misuse of power (*détournement du pouvior*), which represents the latest development of the jurisprudence of recourse, consists in the violation of the spirit of the law, that is to say, the exercise of power for another purpose than that which the law has conferred it. The reports of the council of state are full of cases of this kind. Prefects and mayors, who have a large police power, frequently issue *règlements* ostensibly in the interest of the public

[19] Hauriou, p. 456. Even the refusal of an officer to act when the law requires him to do so (e.g., where a mayor required to deliver a property alignment or a subprefect declines to issue a hunting permit, when the applicant is entitled to it) is construed as an act tainted with incompetence and its nullity will be pronounced.

[20] It is important to emphasize the fact here that the council of state annuls the acts of administrative authorities in violation of their own ordinances as readily as it annuls acts in violation of the statutes. A minister is, of course, free at any time to modify or revoke an ordinance but so long as it remains in force the council of state will insist that it be strictly observed. Thus acts appointing, promoting or removing public officers in violation of the ordinances relating to the civil service (and in France almost the whole law governing such matters is regulated by ministerial ordinances rather than by acts of the legislature), may be nullified and in fact are frequently nullified, by the council of state. The protection against favoritism and other forms of arbitrary action on the part of ministers which the council of state has thus created has gone far toward securing for the functionaries those guarantees which they have long demanded but which the legislature has refused to give them. The solicitude of the council of state for their rights and the frequency with which it has annulled arbitrary appointments, promotions and removals has done much to increase the respect and esteem in which it is held not only by the great body of functionaries but by the masses of the French people.

For a review of some recent important decisions on these points see M. Jèze in the *Revue du Droit Public*, vol. 23, pp. 265 ff.

health or safety when the real purpose is the financial interest of the commune, or some private or political interest.[21] It is now well settled, however, that the acts of administrative authorities to be legal must not only be in conformity with the letter of the law but must be in harmony with its spirit and purpose.

A classic case of the kind, the first in which the doctrine of *détournement de pouvior* was enunciated, arose in 1864 when the prefect of the department of the Marne-et-Seine, under the pretext of his police power, granted to the owner of an omnibus line the exclusive privilege of meeting the trains at the railroad station at Fontainebleau. The council of state declared the act null and void on the ground that it was not a police measure but one the effect of which was to establish a private monopoly and as such was a misuse of power. Another famous case arose in 1872 involving the legality of a prefectoral ordinance forbidding the owner of a mineral spring from selling the waters therefrom. The ordinance was issued as a health measure but in fact the hygienic properties of the water had been established by chemical analysis. The council of state held that the ordinance was issued with another end in view than that which the law contemplated and was therefore null and void.[22]

A still more famous case arose in 1879. The state had established a government monoply of the manufacture of matches and in order to avoid the expense of expropriating unauthorized private manufacturers, a prefect acting under the order of the minister of the interior proceeded to close their establishments upon police grounds. The council of state not only pronounced the order null and void but condemned the state to pay damages to the private manufacturers. In this connection it may be interesting to observe that the private manufacturers had sought relief in the judicial courts but the court of cassation sustained the legality of the ministerial order. Thereupon they attacked the order before the council of state by an action in annulment for excess of power and that body sustained their contention. We have here one of many cases in which private rights have

[21] Compare Laferrière, vol. ii, pp. 453 ff and 521 ff.

[22] Laferrière, vol. ii, p. 531.

found a guardian in the supreme administrative court when the supreme judicial court had upheld the claims of the government.

As has been said, the judicial courts during the period of the Restoration asserted and exercised the right to refuse to impose fines for the violation of all illegal ordinances, even those issued by the crown. But the administrative courts, in the beginning, declined to follow the example of the judicial tribunals, and, while they did not hesitate to allow recourse for excess of power against the ordinances issued by mayors and prefects they refused to allow it against those emanating from the king. The council of state, as has been pointed out, was in bad repute because of its imperial origin and subserviency to the emperor and several attempts were even made to abolish it. The government of the restoration would in all probability have refused to tolerate the exercise of control over royal ordinances although it acquiesced in the exercise of such control by the judicial courts, and it did not interpose objection to annulment by the council of state of illegal ordinances of other administrative authorities than the king.[23] With the advent of the July monarchy, however, and the loss by the crown of its preponderant political rôle, a new theory regarding the immunity of the royal acts from judicial control was developed and in 1845 the council of state asserted and exercised, for the first time, the right to entertain jurisdiction of actions for the annulment of certain ordinances emanating from the king, for reasons of incompetence and vice of form, but not yet for violation of law or misuse of power. At that time and until very recently, however, the council of state made a distinction between simple ordinances emanating from the chief of state, and "ordinances of public administration" (*règlements d administration publique*) the latter of which, but not the former, were required to be submitted to the council of state for its advice. Against the former class of ordinances the council of state admitted recourse for excess of power but it was

[23] Compare Nézard, *Le Contrôle Juridictionnel*, p. 17; Jèze, *Principes Généraux du Droit Administratif*, p. 217; Moreau, *Le Règlement Administratif*, p. 284; and Cormenin, *Questions du Droit Administratif*, p. 64.

refused against the latter.[24] It has long been a practice of the French parliament to delegate very extensive legislative power to the chief of state. It frequently authorizes him to regulate by decree important matters which in the United States belong entirely to the domain of statutory legislation. It is also a common French practice to embody in the acts of parliament only general principles and to delegate to the executive the power to complete the details of the statute by an "ordinance of public administration."[25] The council of state has always regarded such ordinances as a form of delegated legislation and therefore assimilable to acts of parliament. As such they were until very recently held to be exempt from judicial control through actions in annulment for excess of power, exactly as if they were enacted directly by the legislature. If illegal, the judicial courts might refuse to impose fines for their violation but neither they nor the council of state could annul them. As late as 1895 in the *Montreuil* case the council of state refused to entertain jurisdiction of an action in annulment brought by a commune against a decree fixing an indemnity of residence allowed by law to teachers of primary schools, on the ground that

[24] Most of the French jurists recognize two forms of *règlements* of public administration: first, those issued by the chief of state as a result of his constitutional power to oversee and assure the execution of the laws; second, those issued by him in pursuance of delegation by the legislature, as where he is charged by the legislature with regulating by decree some matter with which the law does not deal or where it charges him with completing the details of a law. Both types of *règlements*, however, are required to be submitted to the council of state.

[25] There has been much discussion in France as to whether such ordinances are the result of legislative delegation. The theory of delegation was sustained by most of the older writers like Rossi, Foucart, Aucoc, St. Girons, DuCrocq and Batbie. Most of the present day authorities, however, maintain the contrary view and hold to the principle that legislative power cannot be delegated. Such is the view of Esmein ("de la delegation du Pouvoir Legislatif," *Rev. Pol. et Parl.*, vol. i, p. 209); Berthélemy, *Droit Administratif*, p. 90; Jèze, *Principes Généraux*, p. 221; Nézard, Op. cit., p. 33; and Hanriou, *Droit ad ministratif*, p. 150. Among contemporary authorities, however, who maintain the theory of delegation are Moreau, (*Le Règlement Administratif*, p. 180) and Cahen (*La Loi et le Règlement*, pp. 232 ff.

The decision of the council of state in 1907 admitting recourse for excess of power against this class of ordinances leaves the question one of academic interest only.

the decree was issued by the executive in pursuance of authority delegated by the legislature. But already there were signs of a tendency toward a relaxation of this rule. The council of state had in 1888 asserted the right to determine whether such an ordinance, in a particular case, was regular in form; then it went a step further and asserted the right to determine whether it was regular in substance (*au fond*), that is to say, whether the president in issuing the ordinance had acted within his legal competence.[26] It may also be remarked that the council of state had all along allowed recourse against ordinances issued by mayors in pursuance of authority delegated by parliament. Moreover, the council of state had attenuated the rigor of the old rule by allowing recourse against specific acts in execution of such ordinances. This solution of the problem was quite illogical and was criticized by many of the highest authorities.[27] Why, it was asked, should the council of state refuse to admit an ordinance to be judicially attacked for excess of power when the individual measures by which the ordinance was executed were open to attack and annulment? Finally, in 1907 the council of state seized a favorable occasion to adopt the solution which the best juristic thought of France had long demanded and toward which its own decisions had been tending for some years. In 1901 the president had issued an ordinance of public administration in pursuance of an act of parliament of 1842, under which the state had entered into certain agreements with the railroad companies. The ordinance of 1901 undertook to modify the terms of these agreements by imposing upon the companies new and heavy burdens in respect to the maintenance and operation of their lines. The companies attacked the ordinance on the ground of excess of power. The minister of public works

[26] Jèze, *Revue du Droit Public*, vol. 25, p. 42. The court of accounts (1897) and the court of cassation (1900, 1905) asserted and exercised a similar control. The latter court held invalid a decree of the President issued in pursuance of a law of June 26, 1899, on the ground that he had "manifestly exceeded the powers which the said law delegated to the executive power—and thus encroached upon the domain reserved to the legislative power." See also the note by M. Jèze in the *Rev. du Dr. Pub.*, vol. 23, p. 74.

[27] See Nézard, p. 21 and the authorities cited.

appeared before the council and set up the old plea that ordinances emanating from the chief of state could not be made objects of recourse in annulment for excess of power. The council of state, however, entertained jurisdiction of the case and declared the ordinance null and void as being in excess of power. Thus the old distinction between simple presidential ordinances and ordinances of public administration was abandoned and the immunity from judicial control which the latter had always enjoyed was definitely abandoned after having been maintained for nearly a century.[28] The theory of legislative delegation which the council of state has always maintained was not, however, repudiated. It still holds that such ordinances are the result of delegation by the legislature, but henceforth they are not to be regarded as fully assimilable to statutes and like other ordinances they may be attacked and annulled for excess of power.[29]

This decision constitutes a notable landmark in a long and interesting evolution of the jurisprudence of the council of state in regard to recourse for excess of power. It marks a complete reversal of a line of decisions dating back almost to the origin of the theory of the doctrine of recourse and can only be explained by the increasing liberalism of the council of state and its desire to enlarge still further the protection of private rights against arbitrary and illegal acts of the executive. It was also another interesting exhibition of the independence of the council of state as over against the government. The case was one in which the government was vitally interested and it made a strong effort to induce the council of state to stand by its former decisions and refuse recourse against ordinances of public administration. The far-reaching effect of the decision can only be fully appreciated when we remember that a very considerable and important part of French legislation today is being enacted not by the legislature but by the president in the form of ordinances of public administration, issued in pursuance of legislative delegation. In

[28] This new theory has since been many times affirmed. See the cases cited by Jèze, *Principes Généraux*, p. 222, n. 2.

[29] For a discussion of this now famous case see Jèze in the *Revue du Droit Public*, vol. 25, pp. 51 ff and Nézard, *Le Contrôle Juridictionnel*, pp. 22 ff.

recent years there has been an increasing tendency on the part of the legislature to abdicate its functions and to delegate its powers of legislation to the executive. Almost every important act of parliament today concludes with the familiar clause: "an ordinance of public administration shall determine the measures proper for assuring the execution of the present law.[30] In many cases these ordinances contain important general provisions imposing obligations upon the citizens as well as provisions affecting their rights of person and property.[31] In short, they are intrinsically if not in form veritable legislative acts and there have been many complaints that these ordinances in effect often modified if they did not violate the statutes in pursuance of which they were issued. So long as the council of state refused to allow recourse against them there was no way by which they could be attacked and nullified, and the individuals affected were without redress except that they could attack individually the specific measures in execution of the ordinance. In that case the council of state could annul the measure of execution but not the ordinance itself. It remained in effect and its enforcement could only be prevented by separate and distinct suits brought by each individual affected, against the particular act of execution.

While the council of state by its decision of 1907 abandoned the old distinction between simple presidential ordinances and ordinances of public administration and declared that the latter equally with the former were judicially attackable for excess of power there still remain two classes of presidential acts against

[30] Compare Nézard, Op. cit., p. 23. The following recent examples may be cited in illustration; the law of 1894 concerning cheap tenement houses was completed by an ordinance of public administration of September 21, 1895; the law on associations of 1901 was completed by two ordinances issued in August of the same year; the law of 1904 concerning congregations was completed by two ordinances issued in January and June, 1905; the great law of 1905 on the separation of church and state was completed by the promulgation of three different ordinances. Many others might be cited.

[31] See the examples cited in Nézard, pp. 27–31. Duguit (*Droit Const*, i, p. 195, holds that all *règlements* entail restrictions upon the rights of individuals in respect to their liberty or property and are therefore in effect material, if not formal laws.

which the council of state refuses to allow recourse in annulment for excess of power. The first of these are the decrees, or decree-laws, as they are sometimes called, issued in pursuance of the *senatus consultum* of 1854,[32] which authorizes the president to regulate by decree colonial matters[33] in so far as they have not been regulated by acts of parliament. The law of 1872 which defines in general terms the jurisdiction of the council of state restricts its competence in respect to recourse for excess of power to acts of the "different administrative authorities." Now the council of state has uniformly held that the president when exercising the power of legislation in respect to the colonies acts not as an "administrative authority" but as a "political authority" and consequently his colonial decrees are not subject to attack for excess of power.[34] But having decided in 1907 that ordinances of public administration, which differ in no intrinsic respect from decrees for the government of the colonies (both being the result of legislative delegation) are the acts of the president as an "administrative authority," logic and consistency would seem to require that the council of state should now open its doors to recourse in annulment against colonial decrees, and it is predicted that this will shortly be done.[35]

The second class of acts emanating from the president, against which the council of state declines to admit recourse in annulment for excess of power, are the so-called *actes de gouvernement.* For a long time the administrative jurists of France have recognized a distinction between "administrative" acts and "political" or "governmental" acts; the council of state has approved the distinction and has refused to allow individuals to attack ju-

[32] This *senatus-consultus* of course lost its constitutional character with the downfall of the Second Empire but it still remains in force as a statute.

[33] Except in Martinique, Guadeloupe and Réunion.

[34] Compare Tessier, *de la Responsabilité de la Puissance Publique*, p. 18.

[35] Such is the view of Jèze, *Principes Généraux*, p. 216 and Nézard, *Le Contrôle juridictionnel*, p. 58. Even Laferrière, writing years before the decision of 1907, admitted that if the President should undertake to deal by decree with colonial matters, the regulation of which is reserved to Parliament, the council of state would be justified in treating such a decree as of no force (*Traité*, vol. ii, pp. 8, 9). Compare also Tessier, p. 18.

dicially the latter class of acts for excess of power, because in the performance of such acts the president is not acting as an "administrative" authority. The theory of *actes de gouvernement* has occupied an important place in French administrative law and there is an extensive literature, mostly polemic, dealing with the subject, although the matter is now becoming less and less important because of the increasing disposition of the council of state to abandon the distinction between the two categories of acts. The controversy has raged not so much around the theory upon which the distinction is based as around the question as to where the line of demarcation between the two classes of acts shall be drawn. A present day writer of high standing thus distinguishes between the two: "To *govern*, is to oversee the functioning of the public authorities, to assure the execution of the laws, to carry on relations with foreign powers; to *administer*, is to assure the daily application of the laws and to watch over the relations of the citizens with the public authorities and the relations between the different administrative authorities."[36] Some of the older writers constructed their definitions of *actes de gouvernement* so broadly as practically to deprive the government of all judicial control. Thus Dufour[37] defined an "act of government" as one which "has for its purpose the defense of society against its enemies from within and without" and this view was held by the court of cassation in a number of cases during the periods of the Restoration, the July monarchy and the second empire. Vivien in 1849 stated the generally accepted theory when he declared that "in certain circumstances the measures taken by the government in view of a great public necessity, even though they violate private rights are withdrawn from the control of the courts, otherwise the action of the government would be paralyzed, to the great detriment of the public interest." As has been pointed out by a well known French jurist, there is no abuse of authority which could

[36] Tessier, Op. cit., p. 42. Laferrière, vol. ii, p. 31 and Aucoc, *Conférences*, vol. i, secs. 38, 39, make a somewhat similar distinction.

[37] *Droit Administratif*, vol. iv, p. 600.

not be justified upon such a theory.[38] Other writers have included within the category of governmental acts, measures of protection against invasion, epidemics, floods, riots, insurrections, etc.[39] The whole theory is an arbitrary one; it is hardly consistent with the liberal and enlightened jurisprudence of the council of state and is condemned by some of the most distinguished jurists of France.[40]

There are certain acts of the president, however, which even those who condemn the theory admit to be beyond the control

[38] Brémond, "Des Actes de Gouvernement," in the *Revue du Droit Pubic*, vol. v, pp. 23–75. This article contains a very full and learned discussion of the whole subject. See also Courtois, *Théorie des Actes de Gouvernement* (1899). There is a valuable bibliography of the subject in Moreau, p. 77.

[39] See Laferrière, vol. ii, p. 39; Aucoc, vol. i, sec. 289; and Du Crocq, vol. i, sec. 64. Laferrière mentions also, "measures of sanitary police" (p. 41).

[40] For example by M. Jèze, *Principes Généraux*, p. 232; Berthélemy, *Droit Administratif*, 7th ed., pp. 101, 105; Brémond, article cited p. 23; Michoud, *Annales de l'Enseignement Supérieur de Grenoble*, vol. i, p. 82; Hauriou, *Droit administratif*, pp. 77 ff. Professor Jèze remarks that the distinction between "governmental" and "administrative" acts is most regrettable and is contrary to the spirit of modern French positive law. "There should be no acts of government which are free from judicial control and against which no recourse is allowed when they are illegal. It places the government above the laws upon the pretext that it acts are political." Some writers apparently frightened at the possible consequences of the doctrine in the vague and arbitrary form in which they have stated it, have attempted to attenuate its rigor by laying down the rule that, while the courts may not *annul* such acts they may decline to *apply* them when illegal. Thus Dareste, *Justice Administrative*, p. 222 and Aucoc, *Conférences*, vol. i, sec. 289.

Laferrière (ii, 40) recognizes that while general measures of the government for the protection of the public safety are not attackable for excess of power the individual acts in execution of those measures are. Thus a declaration of a state of siege cannot be made the object of recourse for excess of power but the act of the military commander who orders the imprisonment of an individual or the seizure of his property in pursuance of the decree may be. If this is true, what does the distinction avail the government? What is gained by exempting a decree of siege from judicial interference if the acts by which the decree are carried into execution are attackable? The theory of Laferrière, however, is followed by the council of state and the tribunal of conflicts. They refuse to recognize the right of recourse against decrees proclaiming a state of siege but they allow actions for damages sustained on account of individual acts in execution of the decrees. Thus the council of state has allowed recourse against any act suppressing a newspaper in execution of a declaration of siege although it refused to allow the declaration itself to be attacked. Compare Brémond, Op. cit., p. 64.

of the courts. Such are the acts performed by him in the exercise of his constitutional powers in relation to the legislature; the convocation of the electors, the fixing of the date of the elections; the summoning, adjourning and closing of the sessions of parliament, the dissolution of the chamber of deputies, etc. Exempt likewise are his acts in respect to the conduct of foreign relations, such as the conclusion and execution of treaties. There are, however, signs of a disposition to admit recourse against illegal acts of diplomatic and consular representatives. Thus it has recently been held that an act performed by a diplomatic agent is not necessarily diplomatic and therefore immune from judicial attack since the act may be performed by him in his capacity as a judge, an arbiter, notary or officer of the civil state, as for example, when he performs a marriage ceremony.[41] The danger to which the citizen is exposed from the illegal acts of the government in respect to international relations is not great but as regards acts in the alleged interest of the public safety the possibility of abuse is very considerable. Happily the number of "governmental" acts of this kind against which recourse is refused as has been greatly reduced by the decisions of the council of state, and the tribunal of conflicts. But formerly the number was very large and both the administrative and judicial courts exhibited a deplorable subserviency toward the government. This was especially true during the period of

[41] Jèze, *Principes Généraux*, p. 236. A recent interesting case of the kind arose from the refusal of the French minister to Hayti to celebrate a marriage between two French subjects residing in that country, although there were no legal impediments to their marrying and there was no question as to the legal right of the minister to perform the ceremony. The parties thereupon returned to France and were married. The husband then brought an action for damages against the minister before the civil tribunal at Paris. The minister of foreign affairs induced the prefect to raise the question of conflict but the tribunal of conflicts affirmed the jurisdiction of the civil tribunal and ruled that all acts performed by a diplomatic representative in his character as an officer of the civil state were subject to judicial control. See the interesting comment on this case by M. Jèze in the *Revue du Droit Public*, vol. 28 (1911), pp. 666 ff. But compare the cases of *Bachatori*, *Vaudelet*, *Rasat*, and *Faraut* in which the council of state held that certain acts of a purely diplomatic character were exempt from judicial control. This doctrine is criticised by Jèze (in the *Rev. du Droit Pub.*, vol. 21, p. 83).

the second empire when the independence of the council of state was far less than now. Thus in 1857 it refused to allow recourse against an imperial decree of 1854 forbidding the distillation of cereals—a measure designed to meet a threatened famine. The council of state rejected the petition on the ground that the decree was "a measure of government taken in the general interest and public safety."[42] So with regard to measures adopted by the government against members of dethroned dynasties, the council of state refused to interfere. Thus a decree of 1852 confiscating certain lands given by Louis Philippe in 1830 to his children was held to be a political or governmental act which the council of state would not permit to be attacked for excess of power. Likewise, a decree of the minister of the interior ordering the seizure of the manuscript of a *History of the Princes of Condé*, then in the possession of the Duc d'Aumale was held by the council of state in 1867 to be a political act and therefore not a subject for recourse in annulment.[43]

But since the establishment of the third republic the council of state and the tribunal of conflicts have shown more independence and they have not hesitated to allow recourse for excess of power against many acts which had formerly escaped judicial control because of their so-called "governmental" or "political" character. Thus in 1875 the council of state took jurisdiction of an action in annulment for excess of power brought by Jerome Napoleon whose name had been stricken from the army registers by order of the minister of war. It did likewise in 1887 in the cases of the Princes of Orleans and Prince Murat who had been similarly treated, and jurisdiction was taken notwithstanding the fact that the action of the government had been approved

[42] Brémond, Op. cit., pp. 63–64.

[43] Ibid., p. 65. Laferrière, (ii, 37) admits that "this jurisprudence went too far" in attaching too much importance to the intentions of the government and to *politiques mobiles*. Until the downfall of the Second Empire the so-called *mobile* theory was applied by the courts in dealing with these cases, that is to say, the test of whether an act was "governmental" was made to depend upon the circumstances of the moment and the motives of the government rather than upon the nature of the act. See the comments of Hauriou, p. 78; Laferrière, vol. ii, p. 31, and Berthélemy, p. 99.

by an order of the day adopted by parliament. The order of the minister in respect to Prince Murat was annulled for false application of the law.[44] In 1880 the tribunal of conflicts held that the decrees of the government directed against the religious congregations were not "acts of government" but administrative acts and this also, notwithstanding the fact that they had been approved by parliament. Again in 1889 the tribunal of conflicts rejected the plea of "governmental acts" in the case of the seizure by a prefect under the order of the minister of the interior of the papers of the Count of Paris. Finally, in 1902 the tribunal of conflicts repudiated once more the old theory of "acts of high police or acts of government.[45] So with regard to the expulsion of foreigners the council of state holds that such acts are not political in the sense that they are exempt from judicial attack for illegality.

Thus, thanks to the liberal jurisprudence of the council of state, the old theory of the immunity of "governmental' acts has nearly disappeared. Individual liberty is hardly exposed to serious danger from the little that remains of it. The plea of public safety in defense of acts in violation of the law and of private rights is no longer entertained either by the council of state or the court of cassation. The few acts which remain free from judicial control relate for the most part to international relations and the maintenance of a state of martial law, and even as to these the discretion of the government is now considerably limited.

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Such is the control exercised today by the administrative and judicial courts over the acts of the administrative authorities. When we turn to acts of the legislature we find an almost entire absence of both executive and judicial control.

A distinguished French writer thus describes the legal omnipotence of parliament: "The powers of parliament in our public law, being without limits, the laws which it enacts are not sus-

[44] Laferrière, vol. ii, p. 38.

[45] This was the case of the prefect of the Rhone against the *Société Immobiliére de St. Just.* See the note by Jèze in the *Revue du Droit Public*, 1911, p. 63.

ceptible, when they have been regularly promulgated, of any sort of recourse, even for violation of law."[46] This is the view of the great majority of French jurists.[47] Every act of parliament duly promulgated must therefore be applied by the courts whatever may be their opinion regarding its unconstitutionality.[48]

The question of unconstitutionality was raised for the first time during the July monarchy. In October, 1830, parliament passed a press law which was clearly contrary to article 69 of the charter. M. Cremieux, an eminent jurist, made a strong plea before the court of cassation in which he affirmed the right of the court to refuse to apply the law because of its manifest unconstitutionality and he pointed out that if the legislature could modify or abrogate with impunity any provision of the constitution it followed that there could be no constitution in the true sense of the word.[49] But after ten hours' deliberation the court of cassation decided that it had no power to declare the law unconstitutional; on the contrary the courts were bound to apply every law duly enacted by the chambers and regularly promulgated by the chief of state. In the following year this opinion was reaffirmed by the court of cassation, and again in 1851, and this view has been followed without exception since

[46] Tessier, *De la Responsabilité de la Puissance Publique*, p. 15.

[47] Compare especially Esmein, *Droit Constitutionnel*, pp. 475, 501; Larnaude, *Bulletin de la Société de Législation Comparée*, 1902, p. 220; Nézard, *Théorie Juridique de la Puissance Publique*, p. 17; Laferrière, *Traité*, vol. i, p. 435; Duguit, *Droit Constitutionnel*, vol. i, pp. 158–159. "The Parliament," says Moreau (*La Règlement Administratif*, p. 293), "because it is elected by the nation is subject to no control other than that of the electors and of public opinion; its acts cannot be referred to a tribunal of any kind whatever; rightly or wrongly, it is believed in France at present that this is the price of its independence and that its independence is necessary to liberty and the public welfare."

[48] It may also be added that there is no indirect judicial control in the form of actions for damages on account of the unconstitutional exercise of legislative power. See Laferrière, vol. ii, p. 13. But Duguit (*Transformations du Droit Public*, pp. 85, 241) thinks there are signs of a tendency to recognize the responsibility of the State for injuries resulting from the operation of unconstitutional laws.

[49] The case is reported in Sirey's *Recueil* 33, 1, 357 (1833). See also the comments of M. Jèze in an article entitled, "Le Contrôle des Délibérations des assemblées Délibérantes," in the *Revue Générale de l'Administration*, 1895, p. 411.

the establishment of the third republic.[50] The constitution of 1875 imposes few or no direct limitations on the legislative power and it contains no specific enumeration of the subjects upon which parliament may legislate. Its omnipotence is even more complete than that of the English parliament, for the French legislature is not limited by a body of custom and tradition such as operates in fact to restrict the legislative power in England. Unlike most of the earlier written constitutions of France, the constitution of 1875 contains no declaration of rights and of guarantees of individual liberty such as operate to limit the legislative power in the United States. It is true that some French writers affirm that the fundamental principles embodied in the earlier declarations are in fact a part of the public law of France today and as such are binding upon parliament quite as much as if they had been expressly reaffirmed in 1875 and that consequently the courts are not bound to apply acts of parliament in violation of those principles.[51] But the courts refuse to proceed on this theory and they have regularly applied acts which were clearly in violation of the declaration of rights of 1789.[52]

Many writers who deny the right of the French courts to declare acts of parliament null and void because of their material inconsistency with the constitution nevertheless admit that they may refuse to apply an act for reasons of formal invalidity. Thus if a law is not enacted by the two chambers in accordance with the constitutional prescriptions in regard to the exercise of the legislative power or if it is not regularly promulgated by the president of the republic the courts are not bound to apply it. In other words, while the courts may not control the material content of legislation they may control its extrinsic form[53] and

[50] Seignorel, "Le Contrôle du Pouvoir Legislatif," *Rev. Pol. et Parl.*, vol. 40 (1904), pp. 91–92; see also Larnaude, *Bul. de la Soc. de Lég. Comp.*, 1902, p. 219.

[51] For example, Duguit, *Droit Const.*, vol. ii, pp. 6, 13, and *Coumoul, Le Pouvoir Judiciaire*, p. 229. These writers affirm that the principles of 1789 had become so firmly established that it was unnecessary to reaffirm them in the constitution of 1875. But compare Esmein, *Droit Const.*, pp. 496 and 501, to the contrary.

[52] Cf. Duguit, *Droit Const.*, i, pp. 19, 20 and Seignorel, p. 538.

[53] Such is the view of M. Jèze, *Principes Généraux*, p. 212 (see also his note on the *Ronaux* case of 1903, *Rev. du Dr. Pub.*, 21: 117); Laurent, *Principes de Droit Civil*, vol. i, sec. 3; Duguit, *Droit Const.*, vol. i, p. 159; and apparently Larnaude, op. cit., p. 220.

the court of cassation in the case of 1833 referred to above seems to have admitted this view.

Those who deny the right of the courts to declare acts of the legislature null and void because of their material invalidity rely, first of all, on the theory of the separation of legislative and judicial powers, proclaimed in 1789, and the express interdiction imposed on the judges by the law of 1790 from interfering with the acts of the legislature or suspending their execution.

Others[54] argue that an act of parliament is an emanation of the sovereign will, and cannot therefore be subjected to review, modified or nullified by any authority or organ of the government. This idea, which goes back to Rousseau[55] and which was affirmed in the declaration of rights of 1791, 1793 and 1795 has curiously enough persisted in France until this day. But such an argument, as many French writers have pointed out[56] is specious. They hold, and very properly, that an act of parliament is not an act of sovereignty; it is not necessarily an expression of the *volonté générale*— but is simply the will of a governmental organ, nothing more. Others argue that to allow the French courts such power would provoke conflicts between the legislative and judicial authorities and would put into the hands of the courts the power to obstruct legislative reforms—a power which was tyrannously exercised by the *parlements* of the *ancien régime* and the memory of which led the Revolutionists to deprive by positive law the judiciary of all control over legislation. Finally, it is argued that the conditions, which prevail in France, the habits and the temperament of the French people are so different from those of the United States that the argument from American experience cannot be regarded as decisive.[57] But there have always been able and distinguished advocates in

[54] Tessier, for example, op. cit., p. 15.

[55] *Contrat Sociale*, bk. ii, Ch. 6.

[56] Notably Jèze, *Principes Généraux*, p. 209; Duguit, *Transformations du Droit Public*, p. 85; and Cahen, *Le Loi et le Règlement*, p. 424.

[57] For example Larnaude, op. cit., pp. 225, 227 and Seignorel ("Le Contrôle du Pouvoir Legislatif," *Rev. Pol. et Parl.*, 1904, p. 534). "With our ideas in respect to popular sovereignty," says Seignorel, "we can never permit a single assembly composed of eight or ten judges to hold in check the will of the legis-

France of the American doctrine and the number has steadily increased in recent years.[58] In the national assembly which framed the present constitution, Louis Blanc, speaking on the subject in the session of March 11, 1873, said: "I say finally that in order to hold in check the despotism of a single assembly the better means would be that which would result from giving to the judiciary the right to annul unconstitutional laws.[59] In the same assembly M. Naquet advocated the creation of a supreme court on the American model with similar powers in respect to unconstitutional legislation[60] and in 1894 while a member of parliament, he proposed an amendment to the constitution with this object in view.

The question has in recent years provoked widespread discussion and the American doctrine has been defended by many jurists, notably by Professor Beauregard of the Paris law faculty and a member of parliament,[61] by Charles Benoist, a veteran member of the chamber of deputies, and a distinguished scholar, well known for his tireless championship of proportional representation;[62] by Judge Coumoul of Toulouse,[63] Professors Duguit,[64]

lature, i.e., the will of the nation itself." "Moreover," he adds, "it is perilous to borrow from a foreign country an institution which would not be suitable to our customs, our national temperament or to our political organization." Compare also Boutmy, *Elements d'une Psychologie Politique du Peuple Américaine*, p. 256.

[58] Faustin Hélie one of the great jurists of the July monarchy was apparently such an advocate, for he says: "The application of the laws is the end of justice; but this application necessarily requires that the judge shall determine whether the acts invoked before him are law and what is their meaning. The tribunal of police cannot do other than exercise in regard to ordinances the right that all tribunals exercise in regard to the laws; they verify their legality and interpret them." *Traité de l'Instruction Criminelle*, vol. vi, p. 182.

[59] *Journal Officiel*, Mar. 12, 1873, p. 1707.

[60] See his *La Republique Radicale* (1873), Ch. xi.

[61] See his article in the *Monde Economique*, vol. ii, p. 411 (1894).

[62] See his article in the *Revue de Deux Mondes*, July 15, 1902; also his *Reforme Parlementaire*, Chap. on "La Cour Suprème." In 1903 M. Benoist introduced in the chamber of deputies a proposition to incorporate the declaration of rights into the constitution and to give the Court of Cassation power to annul all legislative acts in violation of the provisions of the declaration (*Journal Officiel*, Ch. des Deps., Apr. 29, 1903).

[63] *Traité du Pouvoir Judiciaire*, pp. 224.

[64] *Transformations du Droit Public*, pp. 97 ff.

Cahen,[65] Moreau,[66] Hauriou,[67] Jèze,[68] Saleilles,[69] Thaller[70] and Jalabert;[71] and by M. Picot,[72] M. Devin[73] and others less well known.

In regard to the argument based on the principle of the separation of powers they point out that the law of 1790 forbidding the judges to interfere with the execution of the laws was designed to meet a situation that no longer exists. The judges at that time were suspected of being out of sympathy with, if not actually hostile to, the reforms inaugurated by the Revolutionists and it was feared that they would stand in the way of the realization of those reforms just as the old *parlements* had blocked the measures of Turgot, Necker and Malesherbes. The law of 1790 was therefore an exceptional measure intended to break the opposition of the judiciary to the new order of things. But the danger from a hostile judiciary in France has long since passed, and the judges today are neither opposed to the republic nor to the reforms advocated by Republicans.[74]

A court which refuses to apply an unconstitutional law, says Duguit, does not interfere in the exercise of the legislative power nor suspend the execution of a law; it merely refuses to apply what purports to be a law but which in fact is no law; to compel the courts to apply such a law is to force them to violate the con-

[65] *La Loi et le Règlement*, pp. 377 ff.

[66] *Le Règlement Administratif*, p. 261.

[67] *Droit Administratif et de Droit Public*, 8th ed., p. 39.

[68] *Principes Généraux*, pp. 208, 224; "Contrôle des Délibérations des assemblées Délibérantes" in the *Rev. Gen. d'Admin.*, 1895, pp. 401–415. See also his brief (in colloboration with M. Bethelémy) in a case before the supreme court of Roumania, in the *Revue du Droit Public*, vol. 29, pp. 139–156. Largely on the strength of their argument the court in 1912 declared unconstitutional a Roumanian statute. See the decision in the *Rev. du Droit Pub.*, vol. 29, pp. 365–368.

[69] *Bulletin de la Société de Lég. Comp.*, 1902, pp. 240–246.

[70] Ibid., p. 249.

[71] Ibid., p. 253.

[72] Same bulletin for the year 1900, p. 75; also his *La Réforme Judiciaire*, pp. 217–219.

[73] *La Loi*, Nov. 26, 1896. The arguments of MM. Jèze, Coumoul and Cahen in favor of the right of the courts to disregard unconstitutional legislative acts are especially full and convincing.

[74] This fact is especially emphasized by Jèze, Duguit, Cahen and Coumoul.

stitution and the effect is to reduce them to a position of dependence upon the legislature, which is itself a violation of the principle of the separation of powers.[75]

Again it is pointed out that the courts have power to refuse to apply illegal ordinances; that there is no essential difference between the right of the judge in the two cases; if therefore, the exercise of the power in one case is a violation of the principle of the separation of powers it must be equally so in the other case. Ordinances of public administration according to the jurisprudence of the council of state are a form of delegated legislation and, as has been shown above, this legislation is often general and important in character. Yet no one asserts that it is a violation of the principle of the separation of powers to allow the courts to control this species of legislation.[76] Furthermore, the French jurists generally admit that the courts may refuse to apply an act of parliament which is formally invalid, that is, one which has not been enacted and promulgated in accordance with the formalities of procedure prescribed by the constitution.[77] Now the distinction between formal and material invalidity has no sound juridical basis. Constitutional injunctions and prohibitions are all of the same force; there is, therefore, no essential difference between the violation by the legislature of a constitutional rule of procedure and the violation of a substantive provision. If the courts may hold the legislature to the observance of the one class of constitutional provisions why should it be denied the right to compel observance of the

[75] *Transformations du Droit Public*, p. 97. For a similar line of argument see Coumoul, Ch. 6. Coumoul concludes his defense of the right of the courts to declare unconstitutional laws null and void as follows: "In reality therefore there are neither obstacles of law nor fact which prevent the judiciary from fulfilling its natural rôle in its relations with the legislative power—a rôle imposed by juridical logic, by the results of established principles and even by the force of things. The only reason for its inaction is its organic feebleness, its subordinate position, and, one may say, its inexistence as a great authority of the State" (p. 231).

[76] The argument from the analogy of judicial control of ordinances is developed at length by Cahen, pp. 383, 423.

[77] This opinion is held by Laferrière, *Traité*, vol. ii, p. 9; and by Larnaude, op. cit., pp. 220–221.

other? Finally, and this is the most important argument, if the legislature may modify or abrogate a provision of the constitution at will subject to no restriction, the constitution, as Cremieux pointed out in his plea before the court of cassation in 1833, is an illusion; it can have no real existence except in so far as the legislature may choose to respect its provisions.

Such is the legal fact. Whether the courts will ever assume to exercise the power which many French jurists now maintain that they already have a legal right to do, is a question which cannot be answered. Professor Duguit thinks it is only a question of time when the American practice will be introduced in France; the council of state especially by its decision of 1907 admitting recourse in annulation for excess of power against ordinances of public administration has, he says, already prepared the way; such ordinances differ in no intrinsic respect from statutes and it is therefore only a short step to the recognition of a similar recourse against the latter class of laws.[78] The late Professor Saleilles said in 1902 that he had not lost all hope of seeing recognized the right of the French courts to pronounce the nullity of laws in violation of rights clearly defined in the constitution.[79] But others are less optimistic.[80] It is quite certain that so long as the present notions regarding the political preponderance of parliament continue no court is likely to assert any direct or indirect control over its acts and, if it should, parliament would not tolerate it, for it is extremely jealous of its prerogatives as over against the executive and the judiciary.

After all, the matter is of far less practical importance than in the United States where the constitutions are instruments of specifically delegated and prohibited powers. It must be borne

[78] *Transformations du Droit Public*, p. 103.

[79] *Bul. de la Soc. de Lég. Comp.*, 1902, p. 241.

[80] M. Jèze for example, commenting on the view of Moreau and Duguit that the decision of the council of state in the *Winkel* case in 1909 was in effect a refusal to apply a provision of the law of finances of 1905 in regard to the removal of public officers, says: "I do not believe anyone can cite a single case in which a court has declared a law unconstitutional, and I do not for my part see a single indication in favor of a change in the existing jurisprudence, however much it may be desired. *Principes Généraux*, p. 212.

in mind, that the French constitution is merely a law of organization; it does not undertake to define and enumerate the powers of the legislature, and, as has been said above, aside from the few rules regarding procedure, it contains no direct or indirect prohibitions on the legislative power. If, therefore, the courts had the unquestioned right to annul acts of parliament for unconstitutionality there would be few occasions for exercising it, because few acts can be contrary to the constitution in its present form.[81] For this reason some writers take the position that little or nothing would be gained by allowing the courts such power, until individual liberty has been "constitutionalized."[82] Finally, the absence of a clear distinction between the constituent and legislative powers would render the system of judicial control ineffective in the face of a parliament determined to make its will prevail regardless of constitutional restrictions. Both the constituent and legislative powers in France are vested in the same body, and if the courts should refuse to apply an act which is contrary to the constitution parliament would only have to organize itself in national assembly and "constitutionalize" the law thus nullified, after which it would be beyond the control of the judiciary.[83] To make judicial control of unconstitutional legislation really effective, therefore, it is necessary to separate more completely the legislative and constituent powers and entrust them to different organs as is done in the United States.

[81] "To speak truly," says Cahen (*La loi et le Règlement*, p. 424) "France has no true constitution; it has laws which fix the organic relations of the public authorities but it has no charter of public liberties in the absence of which the men of the revolution said there could be no constitution." "In France I repeat," says Seignorel (*Rev. Pol. et Parl.*, 1904, p. 536), "we have no constitution; we have only laws relative to the functioning of the public authorities. In this respect we are in a condition of notorious inferiority as compared with other countries."

[82] Such was the opinion of Professor Saleilles, *Bul. de la Soc. de Lég. Comp.*, 1902, pp. 245–246. Compare also the comments of Prof. W. F. Dodd, "Political safeguards and judicial guarantees," in the *Columbia Law Review*, April 1915, p. 12.

[83] Compare the remarks of Seignorel on this point, p. 519.